SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000325-D
(2012-CA-000192)

JAMES CARTER — MOVANT

V.

JEFFERSON CIRCUIT COURT
2009-CI-000925

BULLITT HOST, LLC
d/b/a HOLIDAY INN EXPRESS — RESPONDENT

MOVANT BRIEF

Submitted by:

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was mailed this 11 day of April, 2014 to: **Ms. Susan Stokley Clary**, Clerk of the Supreme Court of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY, 40601; **Mr. Samuel Givens, Jr.**, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; **Hon. Audra Eckerle**, Circuit Judge, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, Kentucky 40202; **R. Hite Nally**, Weber & Rose, PSC, 471 West Main Street, Suite 400, Louisville, Kentucky 40202. It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Jefferson Circuit Court by the movant.

ATTORNEY FOR MOVANT

INTRODUCTION

This is a slip and fall personal injury action in which the Movant James Carter appealed the Trial Court's granting of summary judgment in favor of Respondent Bullitt Host, LLC, (hereinafter "Respondent") and the Court of Appeals affirming it. The Trial Court and Appeals Court erred when they:

- Improperly applied the new "open and obvious" standard from *Kentucky River Medical;*
- Incorrectly related "open and obvious' to duty, rather than to causation, fault and breach as outlined in *Shelton;*
- Mislabeled the hazard Movant fell on as "open and obvious";
- Failed to use the *Lanier v. Walmart* analysis in determining if the hazard was man-made or naturally occurring;
- Failed to address whether the Respondent undertaking a duty to clear ice in the past precludes the open and obvious defense;
- Failed to view the facts in the light most favorable to the Movant.
- Applied the "open and obvious" defense when Movant was forced to encounter the hazard.

STATEMENT CONCERNING ORAL ARGUMENT

The Movant respectfully asks the Court to hear oral arguments on this matter. This case involves complex issues of law and fact which are of first impression.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This case arises from a slip and fall injury that occurred on the Respondent Bullitt East LLC's hotel premises in Hillview, KY. The Appellant, James Carter (hereinafter "Carter") and his family were traveling from Arlington, Texas to Ohio when they encountered a winter storm on the afternoon of February 11, 2008.

It is undisputed that:

- Carter stopped at the Respondent's hotel to spend the night and wait out the storm before continuing to Ohio the next day. (Deposition of James Carter, Appendix 1, p. 104-108).
- The next morning at approximately 6:50 a.m., Carter exited the front door of the hotel and proceeded under the covered walkway. (*Id.* at p. 118).
- As Carter exited the front door, he saw the walkway's overhead lights were not turned on. (*Id.* at p. 122).
- He did not see any snow or snow tracks under the walkway. (*Id.* at p. 121).
- While under the walkway, he fell on his back. (*Id.* at 134).

Respondent's owner and manager, Rajesh Patel, testified:

- He and other employees walk the property to inspect for hazards. (Deposition of Rajesh Patel, Appendix 2, p.44).
- Respondent regularly hires a company for ice and snow removal. (*Id.* at p.45).
- Despite knowledge of inclement weather, Respondent made no attempt to clear the snow and ice. (*Id.*).

Respondent filed a Motion for Summary Judgment arguing the hazard was "open and obvious." Therefore, it did not owe a duty to Carter. The motion was denied on April 28, 2011. In the Opinion and Order denying the motion, the Court stated:

> Here, given that Plaintiff's injury was foreseeable, Defendant owed a duty to Plaintiff. Consequently, a question of material fact exists regarding the issues of breach and causation. Plaintiff in turn had a duty to ensure his own safety,

> secondary to the arguably open and obvious nature of the condition...Although Plaintiff safely negotiated the parking lot the prior evening, the significant precipitation may have materially changed the conditions. Thus he may not have been on notice of the parking lot's subsequent condition. See *Jones v. Abner*, 2011 WL 831670 * (Ky. App., Mar 11, 2011). (Opinion and Order of April 28,. 2011, Appendix 3, p. 8-9) (emphasis added).

On October 26, 2011, Respondent re-filed its Motion for Summary Judgment, again stating that the condition was "open and obvious." No new evidence was introduced into the record. Analyzing the same facts, the Court granted the Renewed Motion for Summary Judgment on November 22, 2011. The Court held the:

- Hazard to be "open and obvious" as a matter of law, not arguable. (Opinion and Order, Appendix 4, p.4).
- Covered carport, was not enclosed. (*Id.*).
- Injury was not foreseeable because Plaintiff had traversed the parking lot the prior evening. (*Id.* at p. 5)

On December 15, 2011, Carter filed a Motion to Alter, Amend or Vacate stating that the fact that the Court changed its position on two key factual issues proves that a genuine question of fact exists. First, the Court found an "arguably" open and obvious to now be "clearly" open and obvious. Second, the Court held Carter was aware of the condition despite previously holding the overnight precipitation may have changed the hazard. Therefore, Carter was not on notice of the condition. (Appendix 3, p. 9). Carter's motion was denied on January 12, 2012 despite the Court's Orders, when taken in concert, show obvious genuine issues of material facts. (Opinion and Order, Appendix 5, p.1).

Carter appealed the rulings to the Kentucky Court of Appeals. The ruling was upheld on April 19, 2013. The unpublished opinion states:

- Because Carter was aware of snow and ice outside and there could be ice in his path, the unseen ice he encountered was open and obvious. (Court of Appeals Opinion, April 19, 2013, Appendix 6, p.5).

- The only exception to an open and obvious hazard is if the injured person was distracted, not if his injury was foreseeable. (*Id.* at p.6).

- Bullitt Host did not breach a duty owed toward Carter. (*Id.* at p.7).

Plaintiff filed a motion for discretionary review on May 20, 2013. While it was being reviewed, this Honorable Court issued two new opinions concerning open and obvious hazards. *Dick's Sporting Goods, Inc. v. Webb,* 413 S.W.3d 891 (Ky.2013); *Shelton v. Kentucky Easter Seals Soc., Inc.,* 413 S.W.3d 901 (Ky.2013).

STANDARD OF REVIEW

Summary Judgment is proper when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56.03. In determining whether to grant a motion for summary judgment, this Court is to view the record "in a light most favorable to the party opposing the motion...and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky., 1991).

"A party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." (*Id.* at 482). Thus, "[t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001).

ARGUMENT

Over the past several years, Kentucky law regarding slip and falls has evolved from defenses allowing for complete bars to recovery to an analysis weighing what action each party should have taken in light of the circumstances- essentially, a reasonableness standard. Recently, this Honorable Court held the "open and obvious" defense is not a complete bar to recovery. *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 392 (Ky. 2010). This position was clarified in *Shelton v. Kentucky Easter Seals Society Inc.*, when this Court emphasized "the existence of an open and obvious danger does not pertain to the existence of duty. *Shelton* at 907.

Instead of adhering to the prior open and obvious law, the Courts relied on Restatement of Torts (2d) § 343A which states open and obvious involves a factual determination relating to causation, fault, or breach but simply does not relate to duty." *Id.* Simply stated, a land possessor's general duty of care is not eliminated because of the obviousness of the danger. *Id.*

This Honorable Court also clarified the definition of an open and obvious hazard. *Dick's*, infra, at 895-896. Under the *Dick's* definition, what Mr. Carter slipped on was not open and obvious. In summary, based on the decisions in *Kentucky River Medical Center*, *Shelton*, and *Dick's*, Carter's claim should not be barred.

I. AN OPEN AND OBVIOUS HAZARD DOES NOT ELIMINATE A LAND OWNER'S GENERAL DUTY OF CARE.

A land owner owes a general duty to all invitees to maintain property in a reasonably safe condition. *Kentucky River Medical Center* at 393. Prior to *Kentucky River Medical Center*, if there was an open and obvious danger, there was no duty on the land possessor to warn or cure the hazard. *Id.* The modern approach, clarified in *Shelton,* emphasizes that the existence of an open and obvious danger does not pertain to the existence of duty, but to a factual determination relating to causation, fault, or breach. *Shelton* at p. 907.

"The existence of the element of duty is clear because of the landowner-invitee relationship and the general duty of reasonable care applicable to landowners." *Id.* at 908. This shifts the focus from the conduct of the injured party to the conduct of the landowner. *Id.* The standard of care in a landowner-invitee relationship, typically reasonable or ordinary care, is fact-intensive and grounded in common sense and conduct acceptable to the particular community. *Id.* at 913. "Accordingly, the foreseeability of the risk of harm should be a question normally left to the jury under the breach analysis." *Id.* at 914.

Bullitt Host owed a general duty of care to Carter-its invitee. The legal analysis ends there. The issue of breach, causation, and injury are fact based and must be answered by a jury.

II. CARTER SLIPPED ON ICE THAT WAS NOT AN OPEN AND OBVIOUS HARZARD UNDER THE LAW

What constitutes an open and obvious hazard was recently clarified by this Court in *Dick's*. "An open and obvious condition is found when the danger is known or obvious." *Id.* at 895. A condition is obvious to a plaintiff when he is aware "not only...of the existence of the condition or activity itself, but also appreciate[s]...the danger it involves." Restatement (Second) of Torts §343A(1), cmt. b(1965); *Id.* A condition is obvious when "both the condition and the risk are apparent to and would be recognized by a reasonable man." *Id.*

The facts of *Dick's* are strikingly similar to the facts of the present case. *Id.* In *Dick's,* the plaintiff entered the premises of Dick's sporting goods on a bad weather day. *Id.* It was raining and the mat inside the door was pooled with water. *Id.* at 896. The Plaintiff appreciated the obviousness of the hazardous mat and attempted to go around it by stepping on a nearby tile. *Id.* Nothing on that specific tile appeared hazardous yet she slipped on the tile and fell. *Id.*

This Honorable Court focused on the area she fell when determining the open and obvious hazard and determined that if she had fallen on the mat, it would have been open and

obvious. *Id.* Unfortunately, she did not fall while standing on the mat; she fell on the neighboring tile, and did not have "knowledge of the existence of the condition." *Id.* A reasonable person, exercising ordinary care, may not have noticed the condition on the tile because of the inherent difficult of detecting moisture on a tile floor." *Id.* Because the condition was not easily perceptible without closer inspection, something not required of an invitee, the wet tile was not known or obvious. *Id.*

Carter knew of the existence of snow and possible ice in the parking lot. If he had fallen in the parking lot, it may have been an open and obvious hazard. Carter did not fall in the parking lot. He fell under a covered walkway with no visible snow or ice. Carter did not have knowledge of the existence of ice under the atrium. Carter was unable to notice the hazard due to the lack of lighting and difficulty in detecting ice on concrete surfaces. As in *Dick's,* Carter attempted to avoid an open and obvious hazard and encountered a condition that was dangerous and inconspicuous. Granting summary judgment was inappropriate and should be reversed.

III. THE COURT ERRED BY NOT APPLYING THE *LANIER V. WALMART* BURDEN-SHIFTING APPROACH.

When analyzing the hazard that causes a claimant to fall, it can essentially be described in two sets. First, the court must determine if it was an indoor or outdoor hazard. If the hazard was indoors and man-made, it is analyzed differently than a naturally occurring, outdoor hazard.

A. Transient hazards are analyzed under the *Lanier* approach.

Under man-made indoors hazards, or hazards created by transient substances, the Court must analyze the case under the burden shifting approach described in *Lanier v. Walmart*, 99 S.W.3d 431 (Ky. 2003). In premises liability cases involving outdoor transient hazards, this Honorable Court has applied a burden-shifting approach. *Martin v. Mekanhart Corp.*, 113 S.W.3d 95 (Ky. 2003).

Prior to *Lanier*, in order to prove a breach of the duty of reasonable care in such a case, a plaintiff had the often insurmountable barrier of proving how long a foreign substance had been present before the injury occurred. This Honorable Court chose to adopt a burden-shifting approach as a middle ground between the imposition of the entire burden of proof on the invitee and the imposition of strict liability on business owners. *Lanier*, 99 S.W.3d at 436.

Under the *Lanier* approach, the Plaintiff must prove that there was a transient substance on the premises, and that it was a substantial factor in causing his injury. This "creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition." *Id.* at 435. The burden then shifts to the defendant to prove that the substance has been there for such a short amount of time that the defendant could not have reasonably discovered and removed it. *Id.*

In the present case, the evidence, when viewed in a light most favorable to Carter, proves he fell under a covered area designed to protect patrons and visitors from the elements. Snow and ice do not naturally occur under covered areas—but, they can be tracked in. Therefore, Carter has met his burden showing this was a transient substance and the focus shifts to whether Respondent acted reasonably

B. Snow in a covered area is not naturally occurring.

The mere existence of snow on a surface does not mean it is naturally occurring. Ice on a porch is not considered naturally occurring despite a sheet of snow and ice on the ground outside. *City of Madisonville,* 249 S.W.2d 133, 137 (Ky. 1952). In *City of Madisonville,* the plaintiff slipped on a sheet of ice on the porch. *Id.* The facts showed that there was a sheet of snow and ice on the ground earlier in the day. *Id.* The Court did not find this hazard to be naturally occurring. *Id.* Instead, the Court analyzed the actions of the Defendant in holding that:

> The circumstances of the weather and icy conditions presented a question for the jury whether the defendant, in the exercise of reasonable care and diligence, should have known of the unsafe condition at the door and have remedied it." *Id.*

City of Madisonville was decided prior to *Lanier.* If analyzed under the present status of the law, *City of Madisonville* would be analyzed under the *Lanier* burden shifting approach.

Carter met his burden by showing the fall happened due to a foreign or transient substance that does not naturally occur under a covered atrium. The burden then shifts to the Respondent to prove the substance has only been there for a short time. Respondent has offered no evidence of the length of time the substance was under the carport, or whether it could not have reasonably discovered and removed the hazard in that time. In fact, the record is to the contrary. The Respondent's agents were supposed to discover hazards and correct them, and did not do so.

Under the facts of this case, it is reasonable to find that the substance Carter slipped on was not "natural", rather tracked in artificially, due to its location under a covered atrium. There is nothing "naturally occurring" of an ice patch under cover. A reasonable inference is that it was tracked in by something else. The purpose of an atrium is to have a safe area of travel, protected from the weather, to welcome people and make them feel secure. It cannot be assumed that snow and ice naturally fall under a covered atrium; it is a fact question that a jury must determine based on evidence.

If it was not a natural hazard, the analysis then follows the standard set out in *Lanier.* When the evidence is viewed in a light most favorable to Carter, the substance was foreign, not a natural hazard.

IV. ONCE THE RESPONDENT UNDERTOOK THE DUTY TO CORRECT, OPEN AND OBVIOUS IS NOT A DEFENSE.

The legal duty of business owners to their invitees is clear: "land possessors owe a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them." *Kentucky River Medical Center*, 319 S.W.3d at 388 (citing *Perry v. Williamson*, 824 S.W.2d 869, 875 (Ky. 1992)). Open and obvious is arguably a defense based on a lack of duty. Once the Respondent undertook the duty, open and obvious cannot be a defense.

The Respondent's representative, Rajesh Patel, testified that the hotel paid for snow removal services. (Appendix 2, p. 45). However, he cannot identify the frequency of snow removal services, nor the criteria used to determine when snow removal services are necessary. (*Id.*) There is no law that states this duty can come and go depending on when a storm starts and stops.

The Respondent undertook a duty to act reasonably upon knowledge of inclement weather. That means, the Respondent should have (1) acted reasonably in eliminating hazards under the covered atrium, (2) called the snow removal service earlier, and (3) warned of potential hazards- to name a few. A"new" duty is not created every 24 hours. A duty is created once it is undertaken. The Respondent undertook a duty to keep its premises reasonably free of outdoor hazards the moment it made the decision to hire snow removal companies in the past, and train its employees to look for outdoor hazards.

The Trial Court erred by creating an arbitrary time when a duty can start and stop. Trial Courts cannot arbitrarily create a time frame to analyze duty questions. Acting under a time frame is part and parcel with reasonableness. It is for a jury to decide. If courts are allowed to make this determination, some courts could find that once a storm starts, the duty is kicked back

in while others may decide that the duty doesn't begin until the storm ends. Still others could feel that a Defendant can wait until it is safe to undertake removal procedures.

The only clear way to decide when a duty is undertaken is to hold the duty begins when initially undertaken. In this instance, duty attached when the Respondent initially undertook to reasonably keep the outdoor premises free of hazards.

This duty does not turn off and on dependent upon whether the snow was still falling outside, or the atrium was not enclosed on all sides. Respondent undertook a duty when it first contracted to remove snow from the area, and it was breached when no procedures were undertaken on February 12, 2008.

Once a Defendant undertakes a duty, it becomes a question for a jury as to whether the Defendant acted reasonably. The evidence in this case, taken in the light most favorable to the non-moving party, shows the Respondent undertook a duty to remove snow. The question should go to a jury as to whether the Defendant acted reasonably in this incident.

V. GENUINE ISSUES OF MATERIAL FACTS STILL EXIST, PRECLUDING SUMMARY JUDGMENT

The trial court erred in granting summary judgment where an issue of material fact still exists. The factual issues must first be resolved so the Court can apply the proper law. Once the proper law is determined, the facts, when viewed in the light most favorable to Carter, will preclude summary judgment. The genuine issues of material facts that must be resoled are:

- Whether the hazard was naturally occurring or a transient substance;
- Whether the injury was equally foreseeable to Carter as it was to the Respondent;
- Whether the Respondent assumed a duty based on prior actions; and
- Whether Carter was compelled to confront the hazard.

It is only after the answering these questions that the Court can determine what law will be applicable. Here, the Trial Court did not answer these questions in the light most favorable to

Carter. At a minimum, genuine issues of material facts prevent the Trial Court from dismissing the case at the summary judgment stage.

A. The substance Carter fell on was transient, not naturally occurring.

It is undisputed Carter fell while under a covered walkway, or atrium. (Appendix 1, p. 118). The atrium was installed to protect patrons of the hotel from hazards, such as inclement weather. The Court held the area was not enclosed but did not define the term. (Appendix 4, p.4). It is not natural for substances to naturally fall under an atrium. Carter did not see snow and ice under the atrium the prior evening or the morning of the fall. Therefore, a reasonable interpretation of the facts is the hazard was created by vehicles or pedestrians. Accordingly, the hazard is transient and not naturally occurring.

In *City of Madisonville*, a Plaintiff slipped on a dimly lit, icy porch. *City of Madisonville* at 137. This was not found to be naturally occurring despite snow and ice on the ground. *Id.* Carter agrees. The analysis of the hazard under the carport or atrium is much different than the analysis of the snow and ice hazard in the uncovered parking lot. The Court erred when it found that this area was not enclosed and any substance found under it was naturally occurring.

Based on these facts, a juror could reasonably determine that in order for ice to accumulate under an atrium, it would have to be transferred there by other means.

B. The injury was as foreseeable to the Respondent as it was to Carter and could have been prevented.

Both Respondent and Carter stated they knew of the inclement weather in the area on February 11, 2008. Carter checked into the hotel the day before, and did not leave the hotel until the next morning.

Respondent's nighttime manager, Blake Gibson, was on duty from 11:00 p.m. on February 11, 2008, until 7:00 a.m. February 12, 2008. (Appendix 2, p.55). He knew or should

have known that the conditions were ripe for ice to accumulate under the atrium. And, he knew or should have known snow and ice would be deposited under the atrium by other patrons (not falling from the sky).

Under Respondent's stated policy, Mr. Gibson was supposed to go outside the front door and look for any hazards. (*Id.* at 65). If the condition was as "open and obvious" as Respondent claims, surely the night manager (whose job it is to go outside and look for hazards) would have noticed the ice under the atrium. In keeping with the Respondent's stated policies, Mr. Gibson had to correct the hazard. (*Id.* at 44). There is no proof Mr. Gibson inspected and took action.

In comparison, Carter had the right to believe the covered walkway was free from potential hazards-that is its purpose. He had not seen any ice the night before when entering the hotel, and did not see any as he stepped out the hotel the next morning. (Appendix 1, p. 121). Therefore, it was not foreseeable to Carter that a dangerous patch of ice would accumulate under the atrium. The Court stated in its April 28, 2011, ruling that:

> Although Plaintiff safely negotiated the parking lot the prior evening, the significant precipitation may have materially changed the conditions. Thus he may not have been on notice of the parking lot's subsequent condition. See *Jones v. Abner*, 2011 WL 831670 * (Ky. App., Mar 11, 2011). (Appendix 3, p.9).

Who was in better position of appreciate the potential risk of the hazard? Carter, who had a right to believe the covered walkway was free of hazards, or Blake Gibson, the employee trained to look for hazards and correct them? A reasonable juror when looking at these facts could determine that had Mr. Gibson should have foreseen that an injury could occur from someone falling on the ice under the atrium. A juror could also find that had Mr. Gibson followed the Respondent's policies, Carter's injury would have been prevented.

C. Respondent undertook a duty to clean up snow and ice.

Rajesh Patel testified that when snow and ice accumulate, the Respondent calls a service to clear the premises. (Appendix 2 at 45). By doing so, Respondent undertook a duty to maintain the premises in a safe manner for the patrons. Once they have undertaken this duty, they are obligated to act reasonable. Further, Respondent trained its personnel to look for hazards and correct them. In this instance Blake Gibson had to do it. He did not correct the hazards. Whether the Respondent called the day Carter fell is immaterial. A reasonable juror can find Respondent was negligent or not acting reasonably by not calling prior to Carter's fall (especially in light of the fact it had done so on prior occasions). Therefore, the Respondent undertook the duty to examine for hazards.

When the facts are in dispute, summary judgment is inappropriate. At a minimum, a jury must determine whether the Respondent undertook a duty. Frankly, this Honorable Court should find the Respondent undertook a duty as a matter of law. In each respect, the Trial Court erred in granting summary judgment.

D. Without any other reasonable option, Carter was forced to encounter the hazard under the atrium.

The only exit Carter could use to not immediately confront a hazard was the lobby exit. Carter knew there was a covered atrium when exiting the front door. The only reasonable option for exiting on the morning of February 12, 2008, was out the double doors in the atrium.

The Trial Court held that Carter could have waited for the sun to come up and melt the snow. (Appendix 5, p. 5). Sure, Carter could have waited at least three days for the sun to melt the snow. Once the Court begins evaluating actions a party could have performed, it is evaluating evidence-a task within the purview of the jury. Further, there is no evidence the hazard under the atrium would have melted if the sun came out.

The hazard was in an enclosed area specifically designed to protect patrons from inclement weather. Carter used the safest option-beneath the covered area. A reasonable juror could find that without any other reasonable option, Carter was forced to encounter the ice under the atrium.

All of these issues are in dispute. These issues are essential to this case because the answers to these issues will determine the law the Trial Court must follow. When these facts are viewed in the light most favorable to Carter, the court must find:

- Carter fell due to a transient substance;
- The hazard was more foreseeable to the Respondent than it was to Carter;
- Respondent undertook a duty based on prior actions; and
- Carter was compelled to confront the hazard.

CONCLUSION

The Trial Court erred by granting summary judgment in favor of Respondent Bullitt East, LLC. The Court failed to find that:

- Respondent owed Carter a duty as an invitee;
- open and obvious relates to fault, not duty;
- a jury must determine the remaining issues of breach, injury and causation;
- the hazard was not open and obvious;
- it was a transient substance that caused Carter's fall;
- it was as foreseeable to the Respondent as it was to the Appellant;
- Carter was compelled to confront the hazard; and
- Respondent undertook a duty based on prior actions.

Based on the facts and legal standards, when these issues are properly analyzed it becomes clear the Trial Court committed reversible error when it granted summary judgment. Accordingly, it is up to this Honorable Court to reverse that order and remand this case.

Respectfully submitted,

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APPENDIX

1. Deposition of James Carter
2. Deposition of Rajesh Patel
3. Opinion and Order of the Court, April 28, 2011
4. Opinion and Order of the Court, November 22, 2011
5. Opinion and Order of the Court, January 12, 2012
6. Opinion of the Court of Appeals, April 19, 2013